Filed 9/29/03 P. v. Bustamante CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAMON ENRIQUEZ BUSTAMANTE, Defendant and Appellant.	G030797 (Super. Ct. No. 01WF2486) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

James L. Crowder, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Janelle Boustany and Douglas P. Danzig, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Ramon Enriquez Bustamante contends the trial court's instructing the jury with CALJIC No. 2.15 deprived him of due process of the law. He also argues CALJIC No. 17.10, without an additional instruction the jury should consider the charged and lesser crimes together, amounted to *Dewberry* error. (*People v. Dewberry* (1959) 51 Cal.2d 548.) We affirm.

I

FACTS

On November 4, 2001, at an apartment complex at Gilbert and Katella in the City of Stanton, Isabel Sanchez parked his pickup truck in the parking lot. In the back of his truck, Sanchez had his gardening equipment, which he valued at about $2,000. He waited for his nephew for about 30 minutes, when he briefly left his truck, with the engine off and the keys inside the truck to search for the nephew. When he returned a couple of minutes later, his vehicle was gone. He had not given anyone permission to drive it. Two hours later, the police returned his truck, but all of his equipment, except a lawnmower, was missing.

After Garden Grove Police Officer Carl Whitney heard a radio call about a stolen truck, he spotted it on a frontage road to Katella. Defendant was the truck's sole occupant. Defendant told the officer the pickup truck was not stolen, and that he had the owner's permission to drive it. He gave his name as Aurelio Bustamante Enriquez with a birth date of September 25, 1955. A social security card on defendant's person bore the name Ramon Enriquez. Defendant explained the card belonged to his brother. At the police station, Whitney gave defendant more opportunities to provide his true name, but defendant kept saying his name was Aurelio. When defendant was confronted with his rap sheet bearing his true name, he explained he made a mistake because he misunderstood the officer.

Defendant told Whitney he recognized the truck as one which belonged to his friend. He said he was concerned for the truck's owner because it was raining. He

decided to take the truck to his house, and remove the equipment and place it in storage. A police officer drove Sanchez to defendant's house and asked whether he could identify his equipment. Everything was there.

Sanchez had met defendant four or five years earlier. He knew him as Ramon. Approximately two years earlier, Sanchez had hired him to do some landscaping, but Sanchez drove a different truck at that time.

Defendant was charged with unlawful taking of a vehicle in violation of Vehicle Code section 10851, subdivision (a), grand theft in violation of Penal Code section 487, subdivision (a), and false representation to a police officer in violation of Penal Code section 148.9, subdivision (a). He pled not guilty to the charges, and the matter proceeded to a jury trial.

Defendant testified during trial. He explained he gave the police a false name because there was a warrant out for his arrest. On April 23, 2002, the jury returned a verdict of guilty on all charges. On June 14, 2002, the court sentenced defendant to the upper term of three years in state prison.

Defendant filed his notice of appeal on June 18, 2002. He claims the court committed two instructional errors.

II

DISCUSSION

CALJIC No. 2.15

Defendant contends the trial court's instructing the jury with CALJIC No. 2.15[1] was error for a number of reasons. According to his argument, the instruction

---

[1] CALJIC 2.15, as given by the court: "If you find the defendant was in possession of recently stolen property, the fact of that possession is not by itself sufficient to permit an inference that the defendant is guilty of the crime of vehicle theft, grand theft, or the lesser crime of petty theft. Before guilt may be inferred, there must be corroborating evidence tending to prove the defendant's guilt. However, this corroborating evidence need only be slight and need not, by itself, be sufficient to warrant an inference of guilt. As corroboration, you may consider the attributes of possession, time, place and manner;

permitted the jury to find him guilty from evidence insufficient to constitute proof beyond a reasonable doubt in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

In a conference out of the presence of the jury, the trial judge read the proposed instruction to both attorneys, and inquired, "Any objection as phrased?" Both said, "No." Even when no objection is made to an instruction in the trial court, however, an appellate court may review the issue if the instruction affected the substantial rights of a defendant. (Pen. Code, § 1259.) When the question is one of law, instructional error is reviewed de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.)

On appeal, defendant claims the absence of a satisfactory explanation of possession of stolen property is a foundational requirement before a jury may infer guilt. He bases his argument on the common law source of the instruction by quoting from *People v. McFarland* (1962) 58 Cal.2d 748, 754, '"[P]ossession of stolen property, accompanied by no explanation or an unsatisfactory explanation of the possession, or by suspicious circumstances, will justify an inference that the goods were received with knowledge that they had been stolen. The rule is generally applied where the accused is found in possession of the articles soon after they were stolen.'" (Accord, *People v. Reynolds* (1957) 149 Cal.App.2d 290, 294.) *Barnes v. United States* (1973) 412 U.S. 837 involved a defendant who was in possession of stolen U.S. Treasury checks and provided no plausible explanation for such possession consistent with innocence. The district court instructed the jury that "[p]ossession of recently stolen property, if not satisfactorily explained, is ordinarily a circumstance from which [it could] reasonably draw the inference and find, in the light of the surrounding circumstances shown by the evidence

---

that the defendant had an opportunity to commit the crime charged, the defendant's conduct, his false or contradictory statements, if any, and/or other statements he may have made with reference to the property, a false account of how he acquired possession of the stolen property, or any other evidence which tends to connect the defendant with the crime charged."

in the case, that the person in possession knew the property had been stolen." (*Id.* at pp. 839-840, fn. omitted.) The Supreme Court stated, "In the present case we deal with a traditional common-law inference deeply rooted in our law. For centuries courts have instructed juries that an inference of guilty knowledge may be drawn from the fact of unexplained possession of stolen goods. James Thayer, writing in his Preliminary Treatise on Evidence (1898), cited this inference as the descendant of a presumption 'running through a dozen centuries.' [Citation.] Early American cases consistently upheld instructions permitting conviction upon such an inference, and the courts of appeals on numerous occasions have approved instructions essentially identical to the instruction given in this case. This longstanding and consistent judicial approval of the instruction, reflecting accumulated common experience, provides strong indication that the instruction comports with due process." (*Id.* at pp. 843-844, fns. omitted.)

Defendant contends the omission of the words "accompanied by no explanation or an unsatisfactory explanation of the possession" resulted in the instruction's being an incorrect statement of law, and deprived him of due process of the law. His argument is, in essence, the same one posed in *People v. Williams* (2000) 79 Cal.App.4th 1157. Citing *Barnes*, Williams also claimed CALJIC No. 2.15 deprived him of due process of the law. (*People v. Williams, supra,* 79 Cal.App.4th at p. 1173.) The *Williams* court held that *Barnes* does not suggest that the failure to explain possession of recently stolen property is a constitutionally-mandated foundational requirement for drawing an inference of guilt. (*Ibid.*) Nor does *Barnes* suggest that no circumstances other than a lack of an explanation can combine with conscious possession of recently stolen property to support an inference of guilt. (*Ibid.*) Rather, the *Williams* court notes that CALJIC No. 2.15 acknowledges that an inference of guilt may rationally arise from the concurrence of conscious possession and many other circumstances. (*People v. Williams, supra,* 79 Cal.App.4th at p. 1173.) "Moreover, this inference is reasonable even if the arrestee gives a plausible explanation for having the property. In our view,

CALJIC No. 2.15 correctly prohibits the jury from drawing an inference of guilt solely from conscious possession of recently stolen property but properly permits the jury to draw such an inference where there is additional corroborating evidence. As long as the corroborating evidence together with the conscious possession could naturally and reasonably support an inference of guilt, and that inference is sufficient to sustain a verdict beyond a reasonable doubt, we discern nothing that lessens the prosecution's burden of proof or implicates a defendant's right to due process." (*Ibid.*)

In the instant case, defendant gave the police an explanation, but the jury did not believe it. In addition to the inference that defendant possessed stolen property, there was significant corroborating evidence. Defendant gave a false name to a police officer. Sanchez testified he was not friends with defendant, and he never gave anyone permission to drive his vehicle. Defendant's explanation had an obvious flaw with regard to his recognizing his "friend's" truck, since Sanchez drove a different truck when defendant worked for him a few years earlier. Additionally, defendant was caught in the act of driving the stolen vehicle. In this case, CALJIC No. 2.15 correctly prohibited the jury from drawing an inference of guilt solely from defendant's possession of recently stolen property but properly permitted the jury to draw such inferences from additional corroborating evidence. Defendant was not deprived of due process of the law.

Defendant extends his argument further, however, by citing *Leary v. United States* (1969) 395 U.S. 6. He says that permitting the jury to infer guilt based on the possession of recently stolen property corroborated by "slightly suspicious circumstances regardless of the defendant's explanation," violates the rule set forth in *Tot v. United States* (1943) 319 U.S. 463, even though CALJIC No. 2.15 has been judicially crafted. The "*Tot* rule," as set forth in *Leary*, states "the 'controlling' test for determining the validity of a statutory presumption is that 'there be a rational connection between the fact proved and the fact presumed.' [Citation.]" (*Leary v. United States, supra*, 395 U.S. 6, 33.) Here, the fact proved is that defendant was in possession of Sanchez's recently-

stolen property, and the fact presumed is that he stole it. There was a rational connection between the two.

It is defendant's position that error resulting from the court's giving CALJIC No. 2.15 is prejudicial. We have already concluded the court did not err, but had the court erred, it would have been harmless. Evidence against defendant is overwhelming. Under the circumstances, it is beyond a reasonable doubt that the court's failure to tell the jury it could not infer guilt from defendant's possession of Sanchez's property, had defendant given a plausible explanation for possessing it, did not contribute to defendant's being found guilty. Therefore, were there error, it would be harmless. (*Chapman v. California* (1967) 386 U.S. 18.)

CALJIC No. 17.10:[2] *Alleged Dewberry error*

Defendant contends the trial court committed reversible error by failing to instruct the jurors that if they had reasonable doubt whether the charged offense or the lesser included offense was committed, they were obliged to give him the benefit of the doubt. In essence, defendant claims the court erred in not instructing the jury with the principles enunciated in *People v. Dewberry, supra*, 51 Cal.2d 548.

---

[2] CALJIC No. 17.10, as given by the court: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crimes charged, you may nonetheless convict him of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. The crime of petty theft under Penal Code section 484-8 is lesser to that of grand theft as charged in Count 2. Thus, you are to determine whether the defendant is guilty or not guilty of the crime charged in Count 2 or any lesser crime. In doing so, you have the discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the charged greater crime."

In *Dewberry*, the court found error: "The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder. This case was a close one on its facts. While there was sufficient evidence to support a conviction of second degree murder, a finding that the offense was manslaughter would be equally warranted." (*People v. Dewberry, supra*, 51 Cal.2d at p. 557.)

In *People v. Reeves* (1981) 123 Cal.App.3d 65, disapproved on other grounds in *People v. Sumstine* (1984) 36 Cal.3d 909, 919, fn. 6, *Dewberry* error was found because the court did not instruct the jury to consider the charged offense and any lesser offense together and to convict of only the lesser offense if a reasonable doubt arose as to which offense was committed, but concluded the error was harmless since CALJIC No. 17.10 was given. (*People v. Reeves, supra,* 123 Cal.App.3d. at p. 70.) Not all courts have agreed with *Reeves*, however. (See *People v. St. Germain* (1982) 138 Cal.App.3d 507.) In *St. Germain*, the jury was instructed with CALJIC No. 17.10, but the defendant requested an additional instruction which read, '"Where the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense upon which the jury has been instructed, and if you entertain a reasonable doubt as to which offense has been committed, you must find the defendant guilty only of the lesser offense.'" (*People v. St. Germain, supra,* 138 Cal.App.3d at p. 521.) On appeal, the court said, "The trial judge accurately assessed the additional requested instruction as redundant. It and CALJIC No. 17.10 both tell the jury that if they find that the prosecution has not proven the elements of robbery (the greater offense) beyond a reasonable doubt then the defendant may be found guilty of the lesser offense (petty theft) if that offense has been proven beyond a reasonable doubt." (*People v. St.*

Germain, supra, 138 Cal.App.3d at p. 522, fn. omitted.) We agree with the *St. Germain* analysis that CALJIC No. 17.10 was sufficient.

III

DISPOSITION

Judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.